TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~1028.~~ 658

THE UNITED STATES, APPELLANT,

vs.

FREDERICK FRERICHS.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 27, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1028.

THE UNITED STATES, APPELLANT,

vs.

FREDERICK FRERICHS.

APPEAL FROM THE COURT OF CLAIMS.

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1 Court of Claims of the United States of America.

FREDERICK FRERICHS, CLAIMANT,
vs.
THE UNITED STATES OF AMERICA. } No. 14589.

I.—*Petition.*—*Filed May* 13, 1885.—*J. R.*

To the Hon. the Court of Claims of the United States of America:

The petition of Frederick Frerichs, the above-named claimant, respectfully shows and states that on or about the 23d day of January, 1878, he commenced an action in the superior court of the city of New York against one Charles R. Coster, who theretofore and then was collector of internal revenue for the fourth collection district in the State of New York, for the purpose of recovering damages for a certain wrongful seizure of the property of your petitioner, made or caused to be made by said Charles R. Coster, as such collector, on the 22d day of May, 1876, in said city of New York, for certain alleged violations of the internal revenue laws of the United States, as will more fully appear by the complaint in said action; that on the 31st day of January, 1878, said Charles R. Coster caused said action to be removed to the circuit court of the United States for the southern district of New York by a writ of certiorari duly issued out of said circuit court; that afterwards, on or about the 25th day of March, 1878, said Charles R. Coster duly made and served his answer to said complaint in said action; that afterwards, on the 7th day of April, 1883, your petitioner, with leave of said court for that purpose obtained, made and served a supplemental complaint in said action, and thereupon, on or about
2 the 11th day of February, 1884, said Charles R. Coster made and served his answer to said supplemental complaint.

And your petitioner further shows that on the 17th day of December, 1884, said action was tried in said circuit court at the city of New York, before Hon. Alfred C. Coxe, judge, and a jury, resulting in a verdict in favor of your petitioner, the plaintiff in said action, and against said Charles R. Coster, the defendant therein, in the sum of ten thousand and thirty-three $\frac{38}{100}$ dollars ($10,033.38) damages, and that afterwards, on the 21st day of January, 1885, a judgment was duly rendered in said action in favor of your petitioner and against said Charles R. Coster for the sum of ten thousand one hundred and thirty $\frac{31}{100}$ dollars ($10,130.31) damages and costs.

Your petitioner has hereto annexed, for full and more particular information, a certified copy of the judgment-roll in said action, consisting of the summons, pleadings, and judgment therein, marked Exhibit A, which said judgment still remains and is wholly unpaid.

And your petitioner further shows that afterwards, on or about the 24th day of January, 1885, the said Charles R. Coster appealed to the Commissioner of Internal Revenue, under section 3220 of the Revised Statutes of the United States, for payment of the said judgment; that thereupon, on the 27th day of January, 1885, said Commissioner of Internal Revenue, having investigated the said appeal or claim of said Charles R. Coster, submitted the same in writing, by letter, to the Secretary of the Treasury of the United States, setting forth the said claim and the facts and cir-

cumstances connected therewith, and stating that he proposed to allow said claim for ten thousand one hundred and thirty $\frac{31}{100}$ dollars ($10,130.31), to be paid to your petitioner upon due entry of satisfaction of said judgment; that thereupon, on the 31st day of January, 1885, in a letter addressed to the Commissioner of Internal Revenue, said Secretary of the Treasury duly approved the said proposal of said Commissioner to allow said claim for ten thousand one hundred and thirty $\frac{31}{100}$ dollars ($10,130.31), to be paid to your petitioner upon due entry of satisfaction of said judgment; that thereupon, on said 31st day of January, 1885, said Commissioner of Internal Reveune duly certified to the allowance of said claim for the amount of said judgment, to wit, said sum of ten thousand one hundred and thirty $\frac{31}{100}$ dollars ($10,130.31); that afterwards, on
3 the 2d day of February, 1885, the Fifth Auditor of the Treasury Department duly certified to the First Comptroller of the Treasury that he had examined and adjusted an account between the United States and the Commissioner of Internal Revenue, and found that the sum of ten thousand one hundred and thirty $\frac{31}{300}$ dollars was due from the United States for the payment of said judgment, payable to your petitioner, but that the said First Comptroller of the Treasury afterwards, on the 10th day of February, 1885, disallowed said claim and refused to certify to the payment thereof, and said claim has remained and is wholly unpaid.

Your petitioner has hereto annexed a copy of the said letter of the Commissioner of Internal Revenue to the Secretary of the Treasury, of January 27th, 1885, marked Exhibit B; a copy of a memorandum, dated January 29th, 1885, signed by H. F. French, Assistant Secretary, approved by the Secretary of the Treasury, marked Exhibit C; a copy of said letter of the Secretary of the Treasury to the Commissioner of Internal Revenue, of January 31st, 1885, marked Exhibit D; a copy of said certificate of the Commissioner of Internal Revenue, of January 31st, 1885, allowing said claim, marked Exhibit E; a copy of said certificate of the Fifth Auditor of the Treasury Department, of February 2d, 1885, and of said disallowance of said claim by the First Comptroller of the Treasury, February 10th, 1885, marked Exhibit F. The original of these exhibits are on file in the Treasury Department of the United States.

Your petitioner's said claim is founded upon section 3220 of the Revised Statutes of the United States, and upon the fact that it has been allowed and certified to be paid by the Commissioner of Internal Revenue by and with the approval of the Secretary of the Treasury as aforesaid.

Your petitioner further states that he is the sole owner of said judgment and claim, and that no other person is interested therein, except Edward Salomon, an attorney and counsellor at law, residing in the city of New York, who has been the attorney and counsel of your petitioner in said litigation, comprising said seizure suit in all its stages, and said action against said Charles R. Coster, and to whom your petitioner is still largely indebted for his services as such attorney and counsel, which indebtedness he has been unable to pay, and for which, as your petitioner is advised and believes, said Edward Salomon has a lien upon said judgment; that no as-
4 signment or transfer of said claim, or any part thereof, or interest therein, has been made, except as stated in this petition; that your petitioner is justly entitled to the amount herein claimed from the

United States, after allowing all just credits and set-offs; that your petitioner came to the United States in 1864, when eighteen years of age, and has since then been a resident thereof; that in 1871 he declared his intention to become a citizen of the United States, and did become such citizen by naturalization on the 19th day of October, 1876; that he has at all times since his said arrival in the United States in the year 1864 borne true allegiance to the Government of the United States; that he has not at any time or in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and that he believes the facts in this petition to be true.

Your petitioner, therefore, demands judgment against the United States of America for the payment of the sum of ten thousand one hundred and thirty $\frac{31}{100}$ dollars ($10,131.31), together with such interest thereon as may be allowed by law.

FREDERICK FRERICHS.

Claimant's post-office address: Care Salomon & Dulon, 115 Broadway, New York City.

STATE OF NEW YORK,
City and County of New York,
Southern District of New York, ss:

Frederick Frerichs, being duly sworn, says that he is the petitioner named in the foregoing petition subscribed by him, and that the facts stated in said petition are true to the best of his knowledge, information, and belief.

FREDERICK FRERICHS.

Subscribed and sworn to before me this 11th day of May, 1885.
[SEAL.] RUDOLF DULON,
Notary Public in and for the City and County of New York, State of New York.

EXHIBIT A.

The President of the United States of America to all to whom these presents shall come, greeting:

Know ye that we, having inspected the records and files of the
5 circuit court of the United States for the southern district of New York, do find certain paper writings there remaining of record in the words and figures following, to wit:

Superior court of the city of New York.

FREDERICK FRERICHS, PLAINTIFF,
against
CHARLES R. COSTER, DEFENDANT.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and

in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated New York, January 21st, 1878.

SALOMON & BURKE,
Plaintiff's Attorney.

Office and post-office address, No. 4 Wall street, New York City.

The President of the United States of America to the judges of the superior court of the city of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause, commenced before you, against Charles R. Coster, defendant, by Frederick Frerichs, plaintiff, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the fifth day of February, 1878, as fully and amply as the same are remaining before you, by whatever names the said parties may *he* called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness, Morrison R. Waite, esq., Chief Justice of the Supreme Court of the United States, the twenty-ninth day of January, in the year one thousand eight hundred and *eighty*-eight.

JOHN I. DAVENPORT,
Clerk.

STEWART L. WOODFORD,
Defendant's Attorney.

6 I have this day personally served upon the clerk of the superior court of the city of New York duplicate of the within writ, at the same time showing the original.

LOUIS F. PAYN,
U. S. Marshal.

Dated Feb. 1st, 1878.

Marshal's fee for service	$2 00
Marshal's fee for travelling	12
	$2 12

(Endorsed:) U. S. circuit circuit court. Charles R. Coster, ads. Frederick Frerichs. Original certiorari. Stewart L. Woodford, United States attorney, attorney for defendant. U. S. circuit court. Filed Mar. 4, 1878. John I. Davenport, clerk.

Superior court of the city of New York.

FREDERICK FRERICHS, PLAINTIFF,
against
CHARLES R. COSTER, DEFENDANT.

The above-named plaintiff respectfully shows that on the twenty-second day of May, 1876, he was the owner and in possession of a certain still,

boiler, worm, receiver, barrels, vinegar, coke, and other personal property at No. 3 Abattoir Place, in the city of New York, then and there used in his business of carrying on the distilling or purification of vinegar; that the lot of land upon which said still and other property was situate, with buildings thereon, was also then in possession of this plaintiff as tenant under a certain lease at an annual rent of four hundred dollars; that for some time prior to said day said defendant had been and then was collector of internal revenue for the fourth collection district of the State of New York; that on said twenty-second day of May, 1876, the said defendant, without any just or reasonable cause, forcibly, wrongfully, and unjustly seized and took, or caused to be seized and taken, from this plaintiff the said real estate and other property of said plaintiff, falsely pretending that this plaintiff had forfeited the said property for a violation of the laws of the United States, and that he had a right
7 to seize and take the same from this plaintiff for such pretended violation of law; that thereupon, on or about the twenty-sixth day of May, 1876, as this plaintiff is informed and believes, the said defendant caused to be filed in the district court of the United States for the southern district of New York a certain information on behalf of the United States of America against the said property so seized and taken possession of by him, in which said information it was alleged and claimed that said property so seized and taken by said defendant had become and was forfeited to the United States of America on account of certain pretended violations of law, and that in order to save his said property from said pretended forfeiture this plaintiff was compelled to and did file his certain claim and answer in said district court to said information, whereby he claimed to be, as in fact he was, the owner and in possession of said personal property and the tenant in possession of said lot of land and buildings thereon at the time of said seizure, and for answer to said information alleged, according to the rules and practice of said district court in such cases, that the said personal property and piece of land and said buildings had not and no part thereof had become forfeited as in said information alleged.

And this plaintiff further shows that the issues involved in said action were tried in said district court on the fifth and sixth days of April, 1877, and resulted in a verdict in favor of this plaintiff; that on or about the fourteenth day of May, 1877, a decree was thereupon entered in said action, whereby it was ordered and adjudged that said information be and the same was thereby dismissed; that after the conclusion of said trial, on said sixth day of April, 1877, a motion was made by the attorney for the United States in said action for a certificate that there was reasonable cause of said seizure; that such proceedings were afterwards had upon said motion in said district court that, as the plaintiff is informed and believes, and as appears on record in said court, on the eighteenth day of December, 1877, the said district court, by an order made and entered in said action, denied the said motion for a certificate of reasonable cause of seizure.

And this plaintiff further shows that after the said trial a portion of the property so seized and taken by said defendant was returned to this plaintiff, but in a greatly damaged condition; that this plaintiff had erected said still and established said business of distilling vin-

egar at the place aforesaid, after due notice to and with the assent of said defendant, only about six weeks before said seizure; that the
8 said property so seized and the fitting up of said business had cost him a large sum of money, to wit, the sum of over two thousand and one hundred dollars; that the portion of said property afterwards returned to him was of the value of less than two hundred dollars, as this plaintiff is informed and believes, whereby this plaintiff suffered a loss of at least one thousand and nine hundred dollars; that by said seizure the said business of this plaintiff was totally destroyed; that at the time of said seizure this plaintiff had a contract with the firm of Wagner and Hofmeister, vinegar manufacturers in said city, whereby, for the distillation of their impure vinegar, he was entitled to receive from them a compensation of two cents per gallon; that this plaintiff had erected said still upon the faith of said contract, and had before the erection of said still fully informed said defendant of the existence of said contract and of his erection of said still upon the faith thereof; that when the defendant made said seizure he well knew of the existence of said contract, and by said seizure intended to prevent its further execution, as this plaintiff is informed and believes; that at the time of said seizure this plaintiff was, under said contract, distilling about one thousand gallons per day and thereby earning, in the average, after the deduction of all his costs and expenses, about twelve $\frac{50}{100}$ dollars per day; that said defendant well knew at the time of said seizure, as this plaintiff is informed and believes, that this plaintiff was earning money by the use of his still and apparatus in the distillation of vinegar, and by said seizure expressly intended, as this plaintiff is informed and believes, to break up this plaintiff's said business and to prevent him from earning any more money under his said contract or otherwise by such distillation of vinegar; that by the said wrongful seizure, so made by the said defendant, this plaintiff was deprived, and was, as this plaintiff is informed and believes, by said defendant expressly intended to be deprived during the pendency of said action, and until the return of a portion of said property, to wit, during the space of three hundred and sixteen days, of the use of his said still and other property for the distillation of vinegar under said contract, or otherwise, and of all his earnings under said contract, or otherwise, by which he has suffered further damages, as this plaintiff is informed and believes, to the amount of four thousand dollars; that by said wrongful seizure this plaintiff was also deprived of the use of said lot of land for nearly a year, to his further damage of the sum of four hundred
9 dallars; that in order to defend his said property against the said wrongful seizure he had to expend and become liable for disbursements of stenographer's fees, referee's fees, and other necessary expenses of over two hundred dollars in said action, as he is informed and believes, and had to employ attorneys and counsel, to whom he is indebted for their services, rendered in and about said seizure and said action, in a large sum of money, which, excepting a very small part thereof, he has as yet been unable, but is still liable to pay, to wit, the further sum of one thousand dollars, as he is informed and believes; and that this plaintiff has suffered other and further damages and injuries by the said wrongful seizure of his said property by said defendant, and by the said injury and destruction of this plaintiff's said property and business, to his damage, as he verily believes of ten thousand dollars.

Wherefore the plaintiff demands judgment for the wrong and injury aforesaid against said defendant, and that said defendant be adjudged to pay him damages to the amount of ten thousand dollars, and interest thereon from the time of such injury, besides the costs and disbursements of this action.

SALOMON & BURKE,
Plaintiff's Attorneys.

No. 4 Wall street, New York City.

CITY AND COUNTY OF NEW YORK, *ss:*

Frederick Frerichs, being duly sworn, says that he is the plaintiff above named; that the foregoing complaint is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

FREDERICK FRERICHS.

Sworn to before me this 23rd day of January, 1878.

RUDOLF DULON,
Notary Public.

No. 4 Wall street, New York.

(Endorsed:) New York superior court. Frederick Frerichs against Charles R. Coster. (Copy.) Complaint. Salomon & Burke, pl'ff's att'ys, 4 Wall st., N. Y.

10 In the circuit court of the United States for the southern district of New York.

FREDERICK FRERICHS, PLAINTIFF,
against
CHARLES R. COSTER, DEFENDANT.

The defendant for answer to the complaint in this action—

Admits that on the 22d day of May, 1876, plaintiff was in possession of a certain still, boiler, worm, receiver, barrels, vinegar, and coke, at No. 3 Abbatoir Place in the city of New York, then and there used in the business of carrying on the distilling of vinegar; but whether the plaintiff was the owner thereof the defendant has no knowedge or information sufficient to form a belief, and he therefore denies the same. The defendant also admits that the plaintiff was then and there in possession of the lot of land and the buildings thereon situated as aforesaid, but whether as tenant or at the rental alleged in the complaint the defendant has no knowledge or information sufficient to form a belief, and he therefore denies the same.

The defendant also admits that for some time prior to said day he was collector of internal revenue for the fourth collection district of the State of New York. The defendant also admits that on said 22d day of May, 1876, he caused to be seized and taken the said real estate and the other property aforesaid, as forfeited to the United States for violation of the laws of the United States relating to internal revenue, and avers that he seized the same because he did believe that said property was forfeited to the United States by reason of violations of the laws of the United States

relating to internal revenue committed by, upon, and by means of the property aforesaid.

The defendant also admits that on the 26th day of May, 1876, a libel of information was filed in the district court of the United States for the southern district of New York, by the attorney for the United States for the southern district of New York, claiming the forfeiture of the property aforesaid to the United States, by reason of certain violations of the laws of the United States relating to internal revenue therein alleged, and that the plaintiff did file his certain claim and answer in said district court, substantially as described in the complaint; but the defendant denies that he caused the said information to be filed, but on the contrary thereof
11 alleges that he duly reported to said attorney for the Unidted States the seizure aforesaid and the causes therefor, and that said attorney for the United States filed the said information upon his own independent opinion and belief, as the defendant is informed and believes, that there was reasonable and probable cause therefor. The defendant alleges that thereupon, by due process of law, the marshal of the United States for said district took from the custody of the defendant the said property and held the same subject to the order of said court, and on and after the 29th day of May, 1876, since which time said property has not been at any time under the control or in the custody of the defendant, and that at the time the said marshal took possession of said property as aforesaid the same was in as good order and condition as when the same was seized by the defendant as aforesaid.

This defendant admits that the issues raised by said information and answer were tried with the result as alleged in the complaint, and that proceedings subsequent thereto were had in said district court, as alleged in the complaint.

The defendant alleges on information and belief that after the entry of the decree dismissing the information mentioned in the complaint the plaintiff was entitled to the return of the property aforesaid upon demand addressed to the said marshal, and that the said marshal was at all times thereafter ready and willing to deliver the same upon demand to said plaintiff, all of which the said plaintiff well knew, but that the plaintiff negligently and wilfully omitted and neglected to make such demand until the 25th day of May, 1877, when said property was returned to him in good order and condition, and without damage thereto.

The defendant admits that the said still was erected by the plaintiff after notice to the defendant, but accompanied with the representation that the supervisor of internal revenue having jurisdiction of said district had permitted and assented thereto, and said defendant did not assent thereto otherwise than to treat said permission and assent of said supervisor, who was the superior in office of the defendant, as binding upon the defendant, but defendant denies that he independently or freely assented thereto. The defendant has no knowledge or information sufficient to form a belief what sum of money, if any, the fitting up of the plaintiff's said business cost the plaintiff, or what was the value of the property returned to the plaint-
12 iff by the marshal as aforesaid, and therefore leaves the plaintiff to make such proof thereof as may be material.

The defendant denies that it was his intention in making the seizure

aforesaid to deprive the plaintiff of any lawful profits of his said business, as stated in the complaint.

The defendant has no knowledge or information sufficient to form a belief whether the said business of the plaintiff was by said seizure totally destroyed, or whether the said plaintiff suffered damage thereby, or by reason of anything alleged in the complaint to the amount stated in the complaint, or any amount.

And for a further and separate defence to this action the defendant alleges that the said seizure was without malice, and in pursuance of what the defendant believed to be his duty in the premises.

And for a further and separate defence to this action the defendant alleges that the plaintiff assented to said seizure in order to try the question of legality of the mode of business referred to in the complaint, and that if any damage be suffered it was because of his said assent to said seizure.

And for a further and separate defence to this action the defendant alleges, upon information and belief, that after the seizure alleged in the complaint the plaintiff waived and released all claim for damages by reason of said seizure.

And for a further and separate defence to this action the defendant alleges that the damage to said plaintiff, it any there was, occurred by reason of the negligence and delay of the said plaintiff in the bringing to trial of the action in the district court referred to in the complaint, and by reason of the negligence and delay of the plaintiff in demanding and receiving from the marshal of the United States the said property, and occurred by the acts and omissions of the marshal of the United States while the property aforesaid was in his possession and under his control, and without the knowledge or participation of the defendant.

Wherefore the defendant demands that the complaint herein be dismissed with costs.

STEWART L. WOODFORD,
United States Attorney.

13 SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Charles R. Coster, being duly sworn, says that he is the above-named defendant; that the foregoing answer is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

CHARLES R. COSTER.

Sworn to before me this 25th day of March, 1878.

G. IRVINE WHITEHEAD,
Notary Public, New York County.

(Endorsed:) U. S. circuit court, southern district of New York. Frederick Frericks versus Charles R. Coster. Copy answer. Stewart L. Woodford, United States attorney for the southern district of New York. Rec'd March 25, '78. To Salomon & Burke, plaintiff's attorneys, 4 Wall street, New York City.

Circuit court of the United States for the southern district of New York.

FREDERICK FRERICHS
ag'st
CHARLES R. COSTER.

Supplemental complaint in addition to the original complaint.

The above-named plaintiff respectfully shows, on information and belief, that since his original complaint in this action was served, and after the said order of the district court of the United States for the southern district of New York, entered on the 18th day of December, 1877, denying said motion for a reasonable cause of seizure in said original complaint mentioned, a bill of exceptions was prepared and settled, and other proceedings had to review the said record and proceedings of said district court; and afterwards, to wit, on or about the 20th day of August, 1878, a writ of error was issued out of this court to said district court in order to review the record and proceedings in said action or information against the said property in the complaint mentioned, and that such proceedings were afterwards had upon said writ of error in this court that on
14 or about the 31st day of July, 1879, by the order and judgment of this court, the said judgment or decree of said district court dismissing the said information, and the said order denying the said motion for a certificate of reasonable cause of seizure were in all things affirmed; and that afterwards, to wit, on or about the 17th day of September, 1879, another writ of error was duly issued out of the Supreme Court of the United States, directed to the judges of this court, in order to review the said last-mentioned record, proceedings, and judgment of this court, and that such proceedings were afterwards had on said last-mentioned writ of error in the Supreme Court of the United States; that afterwards, to wit, in the October term, in the year 1882, of the said Supreme Court, the said judgment of this court was affirmed.

And this plaintiff further alleges, on information and belief, that by the said bill of exceptions and other proceedings for review and said two writs of error and proceedings, he has, since the commencement of this action, been put to the further additional expenses, and incurred further additional liabilities in consequence of and to defend himself and his property against the said wrongful seizure in the said original complaint mentioned; that he had to and did employ attorneys and counsel on said bill of exceptions and preparatory proceedings and said two writs of error and proceedings, and incurred a liability to them for their services in and about the same to the amount of $700, and was subjected to the further necessary expenses and disbursements in and about the said writs of error and proceedings connected therewith, amounting to $67.38.

Wherefore this plaintiff, in addition to the damages by him demanded in said original complaint, demands payment of the sum of $767.38, and interest thereon.

EDWARD SALOMON,
Plaintiff's Attorney, 115 *Broadway*.

(Verified by Frederick Frerichs, March 2d, 1883.)

(Endorsed:) U. S. circuit court for the southern district of New York. Frederick Frerichs vs. Charles R. Coster. Copy complaint, answer, &

supplemental complaint. Ed. Salomon, pl'ff's att'y, 115 B'way, N. Y. City.

15 Circuit court of the United States for the southern district of New York.

FREDERICK FRERICHS, PLAINTIFF,
against
CHARLES R. COSTER, DEFENDANT.

The defendant above named, for answer to the supplemental complaint herein, alleges:

That he has no knowledge or information sufficient to form a belief as to the truth of any of the allegations in the said supplemental complaint contained, and he therefore denies the same and each and every thereof, and prays judgment as heretofore demanded in his answer herein.

ELIHU ROOT,
U. S. Attorney, Attorney for Defendant,
Post-Office Building, New York City.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Charles R. Coster, being duly sworn, says that he is the defendant in this action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

CHAS. R. COSTER.

Sworn to before me this 9th day of February, 1884.

J. L. BUTTERLY,
Notary Public, N. Y. Co.

(Endorsed:) U. S. circuit court. Frederick Frerichs ag'st Charles R. Coster. Copy pleadings. Edward Saloman, pl'ff's att'y. Elihu Root, U. S. att'y, for def't.

At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday, the 17th day of December, in the year of our Lord one thousand eight hundred and eighty-four.

16 Present, the honorable Alfred C. Coxe, acting circuit judge.

FREDERICK FRERICHS
vs.
CHARLES R. COSTER.

Now comes the plaintiff by his attorney, Edward Salomon, and moves the trial of this cause. Likewise comes the defendant, by Henry E. Davies, his attorney. Thereupon a jury is empanelled and the cause proceeds to trial.

After hearing the evidence of the parties, the argument of counsel, and the instruction of the court, the jury returned and on their return render a verdict whereby they find for the plaintiff as follows:

Legal expenses, including interest	$2,481 38
Value of property	2,380 00
Interest to date	3,602 00
Damage to business	3,950 00
	$10,033 38

On motion of Mr. Davies, the court orders that the defendant have a stay of proceedings herein for ten days from Dec. 17, 1884.

A copy.

TIMOTHY GRIFFITH,
Clerk.

Circuit court of the United States, southern district of New York.

Plaintiff's costs.

FREDERICK FRERICHS } *agst.* CHARLES R. COSTER.

Docket fee as per statute			$20 00
Disbursements:			
Paid clerk N. Y. superior court on return on certiorari	$1 50		
Paid filing note of issue Ap'l term, '78	3 00		
" " " " Oct. term, '78	3 00		
17 Paid cl'k April 7, '83, on entry of order allowing suppl'm't'l compl't	$55		
Paid cl'k Jan. 28, '84, on entry of order striking out demurrer	55		
Paid clerk Feb'y 7, '84, on filing note of issue on mo. to place cause on day cal	10		
Paid clerk U. S. dist. ct. for production of papers on trial	1 50		
Cl'k's fee making docket and taxing costs and ent'g judg't	6 00		
Attendance of Henry Dodge and Charles Rose, witnesses, 1 day each	3 00		
			19 20
			$39 20

Taxed at thirty-nine $\frac{20}{100}$-dolls. this 21st day of January, 1885.

JOHN A. SHIELDS,
Dpty. Clerk.

SOUTHERN DISTRICT OF NEW YORK,
State, City, and County of New York, ss:

Edward Salomon, being duly sworn, says that he is the attorney for the plaintiff in the above-entitled cause, and the disbursments charged in the

foregoing bill of costs have been actually made or will be necessarily incurred therein, as deponent believes.

EDWARD SALOMON.

Sworn to before me this sixteenth day of January, 1885.
[SEAL.] RUDOLF DULAN,
Notary Public in and for the City and County of New York.

Please take notice that the bill of costs in within-entitled action, of which the within is a copy, will be taxed before the clerk of said court, at his office in the United States court and post-office building, in the city of New York, on the 21st day of January, 1885, at 10½ o'clock in the forenoon of that day.

Dated N. Y. January 16th, 1885.

Yours, &c.,

EDWARD SALOMON,
Attorney for Plaintiff, 115 *Broadway, N. Y. City.*

To ELIHU ROOT, Esq.,
U. S. Attorney.

18 Endorsed: U. S. circuit court. Frederick Frerichs ag'st Charles R. Coster. Bill of costs and notice of taxation. Edward Salomon, attorney for pl'ff, 115 Broadway, N. Y. City. I admit due service of within bill of costs and of notice, of which within is a copy. Elihu Root, U. S. att'y. Dated Jan. 16, 1885.

Circuit court of the United States for the southern district of New York.

Judgment

FREDERICK FRERICHS, PLAINTIFF,
against
CHARLES R. COSTER, DEFENDANT.

This cause coming on for trial on the 17th day of December, 1884, in the term of this court commencing on the 2d day of December, 1884, before the Hon. Alfred C. Coxe and a jury, and the trial thereof having been proceeded with and concluded on the said 17th day of December, 1884, and the said jury having duly rendered a verdict in favor of the plaintiff and against the defendant for the sum of ten thousand and thirty-three and $\frac{38}{100}$ dollars, now, on motion of Edward Salomon, attorney for said plaintiff, it is ordered and adjudged that the said plaintiff, Frederick Frerichs, recover from the said defendant, Charles R. Coster, the sum of ten thousand and ninety-one and $\frac{11}{100}$ dollars, the amount of said verdict, with interest to date, together with the sum of thirty-nine $\frac{20}{100}$ dollars, costs, making a total of ten thousand one hundred and thirty and $\frac{31}{100}$ dollars, and that the said defendant pay the same to the said plaintiff, and that the said plaintiff have execution therefor.

Judgment signed this 21st day of January, 1885.

Judgment signed this 21st day of J'y, 1885.

JOHN A. SHIELDS,
D'p'ty Clerk.

(Endorsed:) 1438. U. S. circuit court, southern district of N. Y. Frederick Frerichs ag'st Charles R. Coster. Judgment roll. Edward

Salomon, att'y for pl'ff, 115 Broadway, N. Y. U. S. circuit court. Filed Jan. 21, 1885. Timothy Griffith, clerk.

19 All of which we have caused by these presents to be exemplified, and the seal of the said circuit court to be hereunto affixed.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of New York, in the southern district of New York, this eleventh day of May, in the year of our Lord one thousand eight hundred and eighty-five, and of our Independence the one hundred and ninth.

[SEAL.] TIMOTHY GRIFFITH,
Clerk.

I, William J. Wallace, judge of the said circuit court, do hereby certify that the foregoing exemplification is in due form of law.

WM. J. WALLACE.

EXHIBIT B.

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, January 27, 1885.

Hon. HUGH MCCULLOCH,
Secretary of the Treasury:

SIR: I have the honor to submit herewith for your consideration and advisement a claim presented by Charles R. Coster for payment of a judgment amounting to ten thousand one hundred and thirty dollars thirty-one cents ($10,130.31), recovered in the circuit court of the United States for the southern district of New York, by Frederick Frerichs, on the 21st day of January, 1885, against Charles R. Coster, defendant, for damages and costs awarded against him by reason of his official action as a United States collector of internal revenue in making seizure, on the 22d day of May, 1876, of a building, still, and apparatus for distilling, owned or claimed by Frederick Frerichs, at No. 3 Abattoir Place, in the city of New York.

The history of the case is briefly as follows:

The building and contents at No. 3 Abattoir Place, owned or claimed by Frederick Frerichs, were seized on May 22d, 1876, by Law-
20 rence Beattie, a deputy collector under Collector Coster, in the 4th collection district, under instructions from a revenue agent connected with the office of the supervisor of internal revenue, L. M. Foulke, directing such seizure. The case was, on the same day, reported to the U. S. district attorney and to the Commissioner of Internal Revenue, and such report of seizure was the first report in the matter received by the said Commissioner.

A suit for forfeiture of this property was promptly instituted in the United States district court, but upon investigation the Commissioner of Internal Revenue became satisfied that there had been no valid grounds for seizure and forfeiture, and a telegram was sent by counsel, who appeared at the Treasury Department in the case, to Frerichs, in New York, on June 9, 1876, as follows:

"Officers here are disposed to release establishments, provided you will waive any claims for supposed damages, and hereafter keep records show-

ing from whom spirits used in the manufacture were purchased. Will you consent?

On the same day a reply was sent by Frerichs, as follows:

"Yes; we consent to the conditions stated in your telegram."

On the following day, June 10, 1866, a letter was addressed to Hon. George Bliss, U. S. district attorney, instructing him to dismiss the proceedings for forfeiture, and receive a certificate of probable cause for seizure and waiver of any claims for damages consequent upon such seizure. (See copy of the letter with the papers.)

The United States attorney, as appears from the copy of the record, at page 47, required the defendant, as a condition of release of the property, to "sign a certificate of probable cause." His attorney replied that while he was willing to waive any damages sustained, he was not willing to sign a paper which would confess that the officers of the Government had a right to seize.

Without reporting that the defendants had refused to comply with the conditions specified, the United States attorney thereafter passed the case to trial, which resulted in a judgment in favor of said Frederick Frerichs on the 14th of May, 1877, and a decree directing a return to him of the property so seized.

A motion for a certificate that there was reasonable cause of seizure was denied by the court on December 18, 1877.

The forfeiture suit was taken up on writ of error to the U. S.
21 circuit court on the 20th day of August, 1876, and said circuit court on the 31st day of July, 1879, affirmed the decree dismissing the information and the order denying the motion for a certificate of reasonable cause of seizure. (See copy of opinion with the papers.)

On a writ of error issued out of the Supreme Court of the United States on the 17th day of September, 1879, the case was taken to that court for review of the judgment of the circuit court. The only question raised in the Supreme Court was whether the district court erred in refusing to enter the certificate of reasonable cause.

The court said, "We are of the opinion that the refusal of the district court to grant a certificate of reasonable cause is not a matter which can be reviewed in the circuit court or in this court." (See case U. S. *vs.* Abattoir Place, 106 U. S. Report, 160.)

A suit for damages alleged to have been sustained by reason of said seizure was brought against Charles R. Coster on January 21, 1878, by Frederick Frerichs, in the superior court of the State of New York, and the U. S. district attorney was directed by the Commissioner of Internal Revenue to appear on behalf of the defendant in the case.

The suit was removed to the circuit court of the United States for the southern district of New York, and came to trial on the 17th day of December, 1884, and on the same day a verdict was given to the said Frederick Frerichs for ten thousand thirty-three dollars thirty-eight cents ($10,033.38) damages sustained by him by reason of said seizure, and judgment thereon was entered on the 21st day of January, 1885, against Charles R. Coster for the sum of ten thousand one hundred thirty dollars thirty-one cents ($10,130.31) inclusive of interest and costs.

The court was asked to grant a certificate of probable cause of seizure, but refused, for reasons assigned, to do so.

Reports of the several proceedings in each of the suits are filed with the papers, and to them you are respectfully referred for a fuller narration of the facts.

I propose to allow the claim for ten thousand one hundred thirty dollars thirty-one cents ($10,130.31) to be paid to Frederick Frerichs upon due entry of satisfaction of the said judgment.

Very respectfully,

WALTER EVANS,
Commissioner.

22 EXHIBIT C.

Memo.] TREASURY DEPARTMENT, *January* 29, 1885.

In re payment of judgment against C. R. Coster, coll'r internal revenue.

Section 970 R. S. does not provide for this payment because the court has not certified that there was reasonable cause of seizure.

Section 989 R. S. does not provide for it because the court does not certify that there was probable cause for the act done, &c.

It may be observed, however, that sec. 970 is based upon the acts of 1799 and 1807, which related exclusively to customs cases, and that sec. 989 is based upon the act of March 3, 1863, which also relates to customs cases alone.

By sec. 3220 R. S. the Com'r of Internal Revenue is authorized to repay all damages and costs recovered against any assessor, &c., by reason of anything done in the due performance of his official duty. This section does not require any certificate of probable cause by the court.

Sections 970 and 989, as they stand in the statutes, by their terms would cover internal-revenue cases as well as customs cases, and being re-enacted in the revision as of the same date with sec. 3220 it might be claimed that their scope was enlarged so as to apply as well to internal-revenue cases as to customs cases if there were no provision inconsistent with that view.

Construing, however, those sections with 3220 I am inclined to the opinion that the Comm'r of Internal Revenue, with the approval of the Secretary, may make the proposed payment without any certificates by the court of probable cause.

Upon the recommendation of the U. S. attorney and the Com'r of Internal Revenue I advise that the payment be made. See Dunnegan vs. U. S. (17 Ct. Claims, 258.)

(Signed) H. F. FRENCH,
Assistant Secretary.

Approved.
(Signed) H. McCULLOCH,
Secretary.

23 EXHIBIT D.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., Jan. 31, 1885.

To the COMMISSIONER OF INTERNAL REVENUE:

SIR: With your letter of the 27th instant you submitted for the consideration and advisement of the Secretary the claim presented by Charles

R. Coster, formerly collector of internal revenue in the 4th district of New York, for the payment of a judgment amounting to $10,130.31 recovered against him by Frederick Frerichs, on the 21st day of January, 1885, in the circuit court of the United States for the southern district of New York, for damages and costs awarded against said Coster by reason of his official action as a United States collector of internal revenue, in making seizure of a vinegar factory owned or claimed by said Frerichs, at No. 3 Abattoir Place, in the city of New York.

The claim is presented under the clause of section 3220, R. S., which authorizes the Commissioner of Internal Revenue "to repay to any collector all damages and costs recovered against him by reason of anything done in the due performance of his official duty."

After giving an outline history of the case you conclude by proposing to allow the claim for $10,130.31 to be paid to Frederick Frerichs upon the due entry of satisfaction of the said judgment.

Your proposal is hereby approved.

Very respectfully,

H. McCULLOCH,
Secretary.

EXHIBIT E.

Schedule of claims for the refunding of taxes.

No. 1036.

A schedule of claims for the amount of a judgment recovered which have been examined and allowed.

District.	Claimant.	Amount.
4th N. Y	Charles R. Coster	$10,130 31
	Total	$10,130 31

24 I hereby certify that the foregoing claim for amount of a judgment recovered has been examined and allowed.

WALTER EVANS,
Commissioner.

OFFICE OF INTERNAL REVENUE, *January* 31, 1885.

EXHIBIT F.

Report on miscellaneous internal-revenue accounts.

No. 45314.

TREASURY DEPARTMENT,
FIFTH AUDITOR'S OFFICE,
February 2d, 1885.

I hereby certify that I have examined and adjusted an account between the United States and the Comm'r of Int. Rev., and find that the sum of

ten thousand one hundred thirty $\frac{31}{100}$ dollars is due from the United States, as follows, viz:

For the payment of a judgment for damages, interest, and costs, rendered January 21, 1885, in the case of Frederick Frerichs vs. Charles R. Coster.

Schedule No. 1036. Payable to Frederick Frerichs, 4th district New York. Care of Comm'r Int. Rev.

Pay out of the appropriation under section U. S. Revised Statutes, as appears from statement and vouchers herewith transmitted for decision of the First Comptroller of the Treasury thereon.

$10,130.31. D. A. ALEXANDER,
Auditor.

To the FIRST COMPTROLLER OF THE TREASURY.

TREASURY DEPARTMENT,
FIRST COMPTROLLER'S OFFICE,
February 10, 1885.

Disallowed, as per statement.

I admit and certify that there is nothing due on the above account.

WM. LAWRENCE,
First Comptroller.
By J. TARBELL,
Deputy First Comptroller.

To the REGISTER OF THE TREASURY.

25 II.—*Demurrer.*—*Filed Nov.* 14, 1885.

And now come the said defendants, by their Attorney-General, and demurring to the petition in said cause, state as the ground thereof that the petition does not allege facts sufficient to constitute a cause of action.

ROBERT A. HOWARD,
Assistant Attorney-General.

26 III.—*Demurrer overruled.*

At a Court of Claims held at the city of Washington, D. C., on the 11th day of January, A. D. 1886, it was ordered that the demurrer of the defendants herein be overruled.

IV.—*Opinion.*

SCOFIELD, J., delivered the opinion of the court:

This case comes before the court on demurrer. The facts as they appear in the claimant's petition and exhibits thereto are as follows:

May 22, 1876, Charles R. Coster, collector of internal revenue in the fourth district of New York, seized a still belonging to the claimant, and caused an information against it to be filed in the district court. To this the claimant filed his answer. The issue, thus formed, was tried in April, 1877, and resulted in the dismissal of the information. After the trial a motion was made by the United States attorney for a certificate of probable cause, which was refused by the court.

January 23, 1878, the claimant sued Coster in the city court of New York to recover damages for the wrongful seizure of his property. The case was removed to the circuit court of the United States, where it was tried December 17, 1884. The result was a verdict by the jury for $10,033.38, upon which the court entered judgment in favor of the claimant for $10,130.31.

The court, upon application, again refused a certificate of probable cause.

January 24, 1885, Coster applied to the Commissioner of Internal Revenue, under section 3220 of the Revised Statutes, for the payment of this judgment. The Commissioner, after consideration and advisement by the Secretary, certified to the accounting officers that the claim had been examined and allowed.

February 10, 1885, the claim was disallowed by the Deputy First Comptroller "for the reason that there was no certificate of probable cause issued and not sufficient evidence that the seizure was justified."

Under this state of facts, in the opinion of the court, the proper party is entitled to recover the amount of the claim. Whether the claimant or Charles R. Coster is the proper party is the question in dispute.

In Dunnegan's Case (17 C. Cls., 247) and again in Nixon's Case (18 C. Cls., 448) this court held that the Commissioner of Internal Revenue was authorized by section 3220 to direct the payment to be made to the defendant in the judgment, if he had already paid it, if not, to the plaintiff. In these two cases the court found as a fact, what perhaps might be judicially noticed, that it had been the "uniform practice of the Commissioner and Secretary, from the first enactment of the refunding statute, to make allowance in such cases to the judgment creditor and not to require the collector first to pay the same out of his own money, and then himself to apply for repayment from the public Treasury."

27 While such practice cannot control the court in the construction of statutes, it should always be carefully considered, and in doubtful cases allowed to turn the scale.

In Edward's, lessee, v. Darby (12 Wheat., 210), the Supreme Court says:

"In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who are called upon to act under the law and were appointed to carry its provisions into effect, is entitled to very great respect."

In United States v. Moore (95 U. S., 763), the opinion in Edward's, lessee, is cited with approval, and the court adds, "and ought not to be overruled without cogent reasons." This opinion is again approved in United States v. Pugh (99 U. S., 265), and the court there says:

"While the question is one by no means free from doubt, we are not inclined to interfere at this late day with a rule that has been acted on by the Court of Claims and the Executive for so long a time."

The same principle was decided in this court in Hahn's Case (14 C. Cls., 305) and affirmed by the Supreme Court (107 U. S., 402). Also in Alexander's Case (12 Wall., 177, and 7 C. Cls., 205); Wright's Case (15 C. Cls., 87); Brown's Case (18 C. Cls., 537); affirmed by the Supreme Court (113 U. S., 568); and Harrison's Case (20 C. Cls., 122).

It makes no difference that in the Dunnegan and Nixon cases the application to the Commissioner was made by the plaintiffs in the judgments

and in the pending case by the defendant in the judgment, because in all of these cases the prayer of the applicant was the same, to wit, that the judgment might be paid.

In submitting the case to the consideration and advisement of the Secretary the Commissioner says: "I propose to allow the claim for ten thousand one hundred thirty dollars thirty-one cents ($10,130.31), to be paid to Frederick Frerichs upon due entry of satisfaction of said judgment."

To this proposition the Secretary replied as follows: "After giving an outline history of the case you conclude by proposing to allow the claim for $10,130.31 to be paid to Frederick Frerichs upon the due entry of satisfaction of the said judgment. Your proposal is hereby approved."

Thereupon the Commissioner made the following certificate:

A schedule of claims for the amount of a judgment recovered which has been examined and allowed.

District.	Claimant.	Amount.
4th N. Y.....	.....Charles R. Coster.....	$10, 130 31
Total	.....	10, 130 31

I hereby certify that the foregoing claim for amount of a judgment recovered has been examined and allowed.

WALTER T. EVANS,
Commissioner.

OFFICE OF INTERNAL REVENUE,
January 31, 1885.

The name of Coster is here inserted to designate the case, not to change the proposition made by the Commissioner and approved by the Secretary to pay the claim to Frederick Frerichs. It was clearly the intention both of the Commissioner and Secretary, which was in accordnance with the prayer of Coster, to direct that the claim should be paid to the judgment creditor, the present claimant.

28 It is understood that, by the course of business in the Treasury Department, the letter of the Commissioner submitting the case to the Secretary and the Secretary's reply thereto, were attached to and accompanied the final allowance by the Commissioner to the accounting officers.

The objection raised by the Comptroller that the judge had failed to give a certificate of probable cause was not pressed at the argument. That objection would have been well taken if the claim had been presented under section 989. Under section 3220 the question of probable cause must be decided after consideration and advisement of the Secretary by the Commissioner. His decision, unimpeached for fraud or mistake, cannot be reviewed by the accounting officers.

The demurrer is overruled, with leave to the defendants to plead to the petition within twenty days.

29 V.—*Final judgment.*

At a Court of Claims held at the city of Washington, D. C., on the 1st day of March, A. D. 1886, the demurrer of the defendants to the claim-

ant's petition having been overruled on the 11th day of January last, and the defendants declining to plead further, it is ordered, on motion of Halbert E. Paine, esq., for the claimant, that judgment be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said Frederick Frerichs do have and recover of and from the United States the sum of ten thousand one hundred and thirty $\frac{31}{100}$ dollars ($10,130.31).

30 VI.—*Application for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 1st day of March, 1886, in favor of claimant, the defendants, by their Attorney-General, on the 15th day of March, 1886, make application for, and give notice of, an appeal to the Supreme Court of the United States.

ROBERT A. HOWARD,
Assistant Attorney-General.

Filed March 15, 1886.

And now, to wit, March 15, 1886, it is ordered that the appeal be allowed as prayed for.

WM. A. RICHARDSON,
Chief Justice.

31 VII.

In the Court of Claims.

FREDERICK FRERICHS
vs.
THE UNITED STATES. } No. 14589.

I certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the order overruling the demurrer, of the opinion of the court on the demurrer, of the final judgment of the court, of the application of the defendants for and the allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington this 10th day of September, A. D. 1886.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk C't of Claims.

(Indorsement on cover:) No. 1028. The United States, appellant, vs. Frederick Frerichs. Court of Claims. Filed September 27, 1886.

7279——3

JAN 4 1888
JAMES H. MCKENNEY
CLERK

In the Supreme Court of the United States,

OCTOBER TERM, 1887.

THE UNITED STATES, APPELLANT,
vs.
FREDERICK FREDERICKS, APPELLEE. } No. 458.

STATEMENT, ASSIGNMENT OF ERRORS, AND BRIEF FOR APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, APPELLANT,
vs.
FREDERICK FREERICKS, APPELLEE. } No. 658.

STATEMENT, ASSIGNMENT OF ERRORS, AND BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a judgment rendered by the Court of Claims against the United States in the above-entitled cause on the 1st day of March, 1886, in favor of Frederick Freericks for the sum of $10,130.31.

On the 22d day of May, 1876, Charles R. Coster, collector of internal revenue in the fourth district of New York, seized a still and other property belonging to claimant, and caused information to be filed against it, for alleged violations of the internal-revenue laws. To this claimant filed his answer, and the issue thus joined was tried in April, 1877, and the information dismissed.

After this trial a certificate of probable cause was asked by the United States attorney, which was refused by the court. In January, 1878, the claimant sued Coster in the superior court of the city of New York, to recover damages for the wrongful seizure of his property. The case was removed to the circuit court of the United States, where it was tried on December 17, 1884, which resulted in a verdict for $10,033.38, upon which the court entered judgment in favor of the claimant for the sum of $10,130.31. The court, upon application, again refused certificate of probable cause.

January 24, 1885, Coster applied to the Commissioner of Internal Revenue under section 3220, Revised Statutes, for the payment of the judgment. The Commissioner, after consideration and advisement by the Secretary, certified to the accounting officers that the claim had been examined and allowed for the amount of the judgment recovered, to be paid to Frederick Freericks upon due entry of satisfaction of said judgment. February 2, 1885, the Fifth Auditor of the Treasury certified to the First Comptroller of the Treasury that he had examined and adjusted an account between the United States and the Commissioner of Internal Revenue, and found that the sum of $10,130.31 was due from the United States, for the payment of said judgment, payable to said claimant. That afterwards, the First Comptroller of the Treasury, on the 10th day of February, 1885, disallowed said claim, and refused to certify to the payment thereof. May 13, 1885, claimant filed his petition in the Court of Claims setting forth the aforegoing facts, etc., and demanding payment of the judgment allowed him as aforesaid. A demurrer

was filed to this petition, which was overruled January 11, 1886, whereupon judgment was entered in favor of the claimant for the sum of $10,130.31, from which judgment the defendant has taken this appeal.

ASSIGNMENT OF ERRORS.

The court below erred in overruling the demurrer and entering judgment for the claimant in the sum of $10,130.31.

ARGUMENT.

The questions presented by the demurrer were:

First. That not the claimant, but Charles R. Coster, was the proper party to recover the amount of the claim.

Second. That the claimant had not alleged satisfaction of the judgment, or a readiness to satisfy it in payment of the amount.

It is contended that these facts do not present a cause of action against the Government. The facts show that an award was made in favor of Coster, who was then a collector of internal revenue. This award was made in his favor under the provisions of section 3220 of the Revised Statutes and in pursuance to the language and terms of that statute. It was made to Coster upon his application. The statute provides that upon appeal the Commissioner of Internal Revenue is authorized to remit, refund, and pay back all taxes erroneously assessed or collected. Here, then, is an appeal and an allowance

made. The appellee is not the person making the appeal in the first instance, but it is the collector. Then how stands the suit at bar? Here a third party and a stranger to the award seeks to recover its fruits in settlement of a judgment in his favor obtained against Coster.

It will be seen that this suit lacks two essential elements to give it force and effect against the Government. First, the claim allowed by the Commissioner was that of Coster, and not of the appellee, and such an allowance was not sufficient to create any liability, on the part of the Government, in favor of a judgment creditor of Coster. Hence the judgment creditor could have no cause of action against the Government. The allowance to Coster is in the nature of a guaranty—it is conditional. It presupposes the doing of some act that must be shown to have been done and performed by him, to wit, the payment or satisfaction of a claim against Coster, for acts done in the performance of his duties as a public officer. The appellee is a stranger to the judgment of allowance made by the Commissioner. No legal rights of his were involved in the appeal. The judgment simply amounted to an agreement by the Government with Coster to pay his debt. Such an agreement can not be sued on by a third party. Freericks could not have been compelled to receive payment of his judgment from the Government, and even a tender of payment by the Government could not have affected his rights under it as against Coster. The rights that Freericks had were obtained under his judgment against Coster. These were all he ever had. He has never come into mutual relations with the Government, and without ever having presented any claim to

the Commissioner and without ever having acquired any rights under the award to Coster, brings this suit.

It is, then, a suit to recover upon a judgment brought by a party with which he has no possible connection, except as judgment creditor of the party in whose favor it was rendered. This is without any legal sanction. Though Freericks had been named as usee in Coster's claim he could not recover in this action. (Freeman on Judgments, § 437.)

Though the judgment was rendered by mistake in Coster's name instead of the claimant's, he could not recover on it. (Waite's Actions and Defenses, vol. 4, p. 186.) It is very doubtful whether the Commissioner could render a judgment for Coster until Coster had paid the judgment against himself, and it is clear that he could not render a judgment for appellee until an application had been made by him, or an agreement to receive the amount in satisfaction of his judgment against the collector.

Secondly, the award was made to Coster by the Commissioner, to be paid to appellee when his judgment against Coster was fully receipted. Appellee does not aver that he has receipted the judgment, nor in any way relieved Coster from his liability, nor that he is ready to do so. Certainly in no aspect of the case can he recover against the Government without having done anything to release his judgment against Coster. The release of the judgment against Coster was a condition concurrent to receipt of the money from the Government. Concurrent conditions are mutual conditions precedent. (Anson on Contracts, p. 289.)

This case differs materially from the Dunegan and Nixon Cases. In those cases the party in whose favor the allowance was made by the Commissioner of Internal Revenue brought the suit.

In this case a third party brings the suit to recover the allowance made to Coster. The allowance was to Coster and for his benefit, not for the benefit of the judgment creditor. (*Dunegan's Case*, 17 C. Cls. R., 247; *Nixon's Case*, 18 C. Cls. R., 448.)

The statement of the Commissioner of Internal Revenue to the Secretary of the Treasury that the money allowed on the claim would be paid to Coster in a certain way, to wit, in satisfaction of a judgment against Coster and directly to the judgment creditor, lacks every element of a contract. This was not the application of the allowance to Coster in the terms in which it had been made. There is nothing to show that Coster had ever asked for or consented to such application of the award made by the Commissioner. This was a voluntary direction, and did not constitute a contract or agreement with any one.

The appellee insists "that where one person makes a promise to another for the benefit of a third person that third person may maintain an action upon it, even in the absence of the consideration which exists in the case at bar between the promisor and the third person to support an implied contract. In the case at bar there never was any privity of consideration between the United States and Freericks, the appellee. Coster made the appeal to the Commissioner of Internal Revenue in his own name, and the award could be made to him alone. This allow-

ance was not made to the appellee, and the voluntary direction for its payment made by the Commissioner was not an actionable promise to Coster. There was no sort of consideration for such direction between the Government and the appellee. There was no promise, express or implied, from the Government to pay Freericks any thing, and the only liability that the award by the Commissioner of Internal Revenue could create would be between the United States and Coster, the collector. His allowance to the claimant is conclusive, unless it be impeached in some appropriate form. (*United States* v. *Kaufman*, 96 U. S. R., 567.)

The court that tried Freericks's case against Coster refused to give a certificate of probable cause for the seizure, and therefore Freericks acquired no rights against the Government by his judgment. Anything that Freericks gets from the Government will not be paid because of any obligation to pay, but solely for Coster's benefit. But a third party can not maintain an action upon a promise made for his benefit where the beneficiary was not privy to the consideration of the promise, as is contended by the appellee in this case. The law upon this question is stated in Anson on Contracts, pp. 195–200 *et seq.*

In support of his proposition the appellee relies upon authorities from Massachusetts and New York.

To support the doctrine contended for by the appellants the following cases are cited: *Simpson* v. *Bowen*, 68 N. Y., 355; *Exchange Bank* v. *Rice*, 107 Mass., 37; *Mellen* v. *Whipple*, 1 Gray, 317.

The case of *Simpson* v. *Bowen* meets the case in point. In this case it was decided that "a promise for a valid

consideration by A to B gives no right of action to C, he being neither privy to the contract nor to the consideration unless it was made for his benefit, and he was the party intended to be benefited; the fact that a benefit would inure to him from the performance is not sufficient." This whole question has been considered and the position maintained in the case of *Johnston* v. *United States* (13 C. Cls. R., 217).

The limitation to the rule stated by the appellee is that the promise must be by simple contract. If under seal or by specialty, the party to whom the promise is made must bring the suit. The allowance by the Commissioner has been held to be a judgment, and it is well settled that only the plaintiff in the judgment can bring suit upon it. The arguments by which the opposing counsel seek to meet the want of the averment of the satisfaction of the judgment, show how complete a stranger the appellee is to the alleged promise to pay, upon which he sues. The authorities he invokes to sustain his position are not in point. No one single character of the present suit shows any relationship between the parties, from which a right of action can arise. The appellee is in all respects a stranger to the award made to Coster, and can not recover in this suit.

It is therefore respectfully submitted that the judgment in this case should be reversed.

A. H. GARLAND,
Attorney-General.
R. A. HOWARD,
Assistant Attorney-General.

NOV 7 1887

Supreme Court, United States.

OCTOBER TERM, 1887.

No. 658.

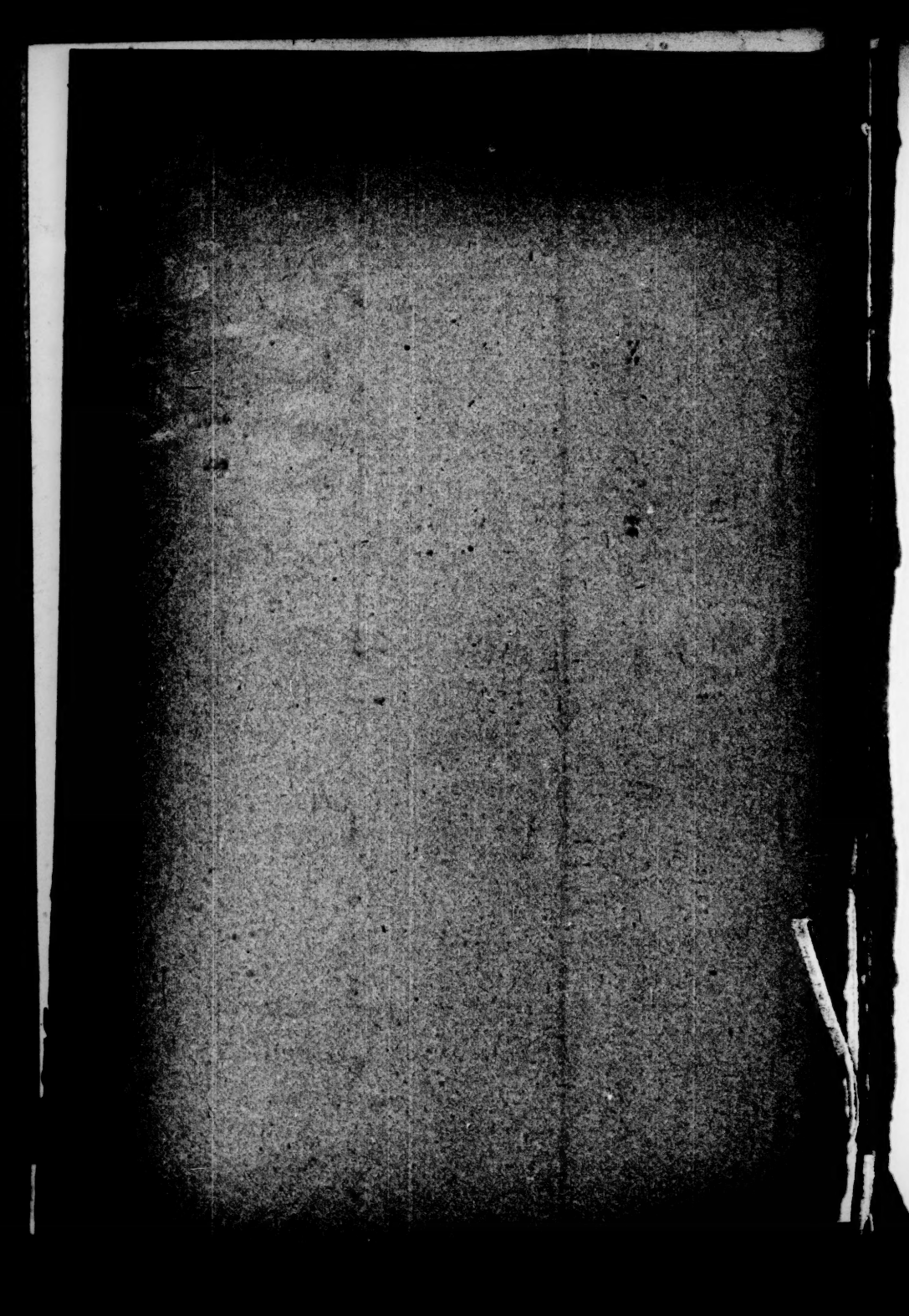
THE UNITED STATES, Appellant,

v.

FREDERICK FRERICHS, Appellee.

BRIEF FOR APPELLEE.

EDWARD SALOMON,
Att'y for Appellee.



Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, APPELLANT,

v.

FREDERICK FRERICHS, CLAIMANT AND APPELLEE.

No. 658.

Argument for Appellee.

STATEMENT OF FACTS.

May 22, 1876, Charles R. Coster, collector of internal revenue in the fourth district of New York, seized a still and other property belonging to the claimant, and caused an information against it to be filed in the district court for alleged violations of the internal revenue laws. To this the claimant filed his answer. The issue thus formed was tried in April, 1877, and resulted in the dismissal of the information. After the trial a motion was made by the United States attorney for a certificate of probable cause, which was refused by the court.

January 23, 1878, the claimant sued Coster in the superior court in the city of New York, to recover damages for the wrongful seizure of his property. The case was removed to the circuit court of the United States where it

was tried December 17, 1884. The result was a verdict by the jury for $10,033.38, upon which the court entered judgment in favor of the claimant for $10,130.31. The court upon application again refused a certificate of probable cause.

January 24, 1885, Coster applied to the commissioner of internal revenue under section 3220 of the Revised Statutes for the payment of this judgment. The commissioner, after consideration and advisement by the secretary, certified to the accounting officers that the claim had been examined and allowed for the amount of the judgment recovered to be paid to Frederick Frerichs upon due entry of satisfaction of said judgment.

February 2, 1885, the fifth auditor of the treasury duly certified to the first comptroller of the treasury that he had examined and adjusted an account between the United States and the commissioner of internal revenue and found that the sum of $10,130.31 was due from the United States for the payment of said judgment, payable to the claimant.

February 10, 1885, the first comptroller of the treasury disallowed said claim and refused to certify to the payment thereof, wherefore it has remained unpaid.

May 13, 1885, the claimant filed his petition in the court of claims setting forth the foregoing facts with copies of records, &c., in detail, demanding payment of the judgment allowed to him as aforesaid.

The attorney-general of the United States filed a general demurrer to the petition, which was overruled by the court January 11, 1886, and the defendant declining to plead further, judgment was rendered for the claimant for the sum of $10,130.31, from which judgment the defendant has appealed.

Two grounds only were urged on behalf of the defendant in the court below, to wit:

First. That not the claimant, but Charles R. Coster, was the proper party to recover the amount of the claim.

Second. That the claimant had not alleged satisfaction of the judgment, or a readiness to satisfy it, on payment of the amount.

ARGUMENT.

Point I.

THE CLAIMANT WAS THE PROPER PARTY TO BRING THIS ACTION.

First. Section 3220 U. S. R. S. concerning this subject reads as follows:

> Sec. 3220. The commissioner of internal revenue, subject to regulations prescribed by the secretary of the treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty.

This statute does not direct by whom the appeal or claim shall be made to the commissioner, or to whom payment of the "damages and costs recovered" shall be made. While in the previous part of the section authority is given to the commissioner "to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court for any internal taxes collected by him, with the costs and expenses of the suit," the portion here under consideration referring to "damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, or inspector," is silent concerning the person or officer to whom the payment is to be made, and the

use of the word "repay" does not necessarily require payment to the judgment debtor, because it is quite correct to speak of a repayment to a plaintiff of damages and costs sustained by him. So that there is nothing in the letter of the law which requires the commissioner to pay the judgment to the judgment debtor, after he has first paid it.

Nor does the purpose, object, or spirit of the law require or warrant a construction by which the commissioner could only repay or allow a repayment of the damages and costs to the judgment debtor after he had, perhaps at great sacrifice, first paid the judgment.

In two well considered cases, the court of claims has taken the same view of this statute, and decided accordingly.

In *Dunnegan* v. *United States* (17 Ct. Cl., pp. 247, 258, and 259) the court said:

> It is objected, further, that the payment is allowed in favor of the plaintiff in the judgment, instead of the defendant. Is this a mistake? The language of the law is, "authorized * * to repay * * all damages and costs recovered against" the officers named. This particular clause of the section does not specify to whom the repayment shall be made. If it had said "pay all damages and costs," the meaning could not have been doubtful. The payment would be made to the plaintiff without doubt. The word "repay" is often used as synonymous with "restore." In that sense, it would have authorized the loss to be restored to the party who had suffered it; to the defendant, if he had paid it, and to the plaintiff, if the loss still rested on him. The repayment, it is said, is for the protection of the officer, not the aggrieved citizen. True, but that fact does not favor the proposed construction. A deputy-collector is not supposed to be rich, while the damages recovered may be very large. To require him first to pay the money, raised perhaps by a loan, or sacrifice of property, would be poor protection. He might not be able to raise it at all, and, in that event his property would be sold on execution, and in many of the States he could be imprisoned. In reply it is said execution would be stayed by the certificate of probable cause. It should be remembered, however, that under section 3,220 no certificate is required or authorized. But, if it were, it can hardly be supposed congress intended to originate such proceedings to work out such dishonest results. *We are, therefore, of the opinion that the only practical and honest construction that can be given to this clause of the law, is that the "damages recovered" shall be paid to the defendant, if he has satisfied the judgment, if not, to the plaintiff. This construction is in accordance with the uniform practice of the department since the law was passed.*

In *Nixon* v. *United States* (18 Ct. Cl., pp. 448, 456) the court said:

> It is further objected, on the part of the defendants, that the commissioner of internal revenue has no authority, under section 3220 of the revised statutes, to allow their repayment of the amount of a judgment directly to the judgment creditor; and that he can make an allowance thereunder only to the collector or other officer himself, after he has paid the judgment recovered against him. That might, perhaps, be so, if the business of the commissioner were required to be conducted with all the strict and technical formalities applicable to actions at law, or were, in fact, generally so conducted. But the findings show, what perhaps might be judicially taken notice of, upon suggestion of counsel, as the course of public business, that it has been the uniform practice of the commissioner and the secretary of the treasury, from the first enactment of the refunding statute to the present time, to make allowance, in such cases, to the judgment creditor, and not to require the collector, or other judgment debtor, first to pay the same out of his own money, and then himself to apply for repayment from the public treasury.
>
> The practice is a useful, reasonable, and proper one, and ought to be upheld. It would be impracticable and often impossible for a collector, or other officer, to obtain money sufficient to pay such judgments against him, and it would be of no use, except to meet a pure technicality. He might be subjected to great hardship, loss, and even bankruptcy, if such judgments were required to be enforced against his property, before he could obtain the beneficent relief accorded to him by statute. We so held in Dunnegan's case. (17 C. Cls. R., 247).
>
> Unless there were some reasons known to the commissioner, why an officer should be made to pay the judgment himself, it would be a mere idle circuity, not favored in law, to require the money, which the commissioner intended to refund, to pass to the judgment creditor through the hands of the officer. *Circuitus est evitandus.* That there were no such reasons in this case is shown by the fact that the commissioner made the allowance to the judgment creditor. His unimpeached decision in that matter ought to be conclusive. Besides, it is by no means a perversion of the meaning of the language of the statute to hold that payment to the judgment creditor in such case is practically, and in legal effect, payment to the judgment debtor, since it relieves the latter from his liability and is, therefore, to his use and for his benefit. At the same time, it effectuates payment to the very person to whom the money is actually due and ultimately payable, and thus secures the accomplishment of the object of the statute, and prevents the remedy of the judgment debtor from being lost or destroyed through the inaction or pecuniary inability of the defendant's revenue officers to do an act which does not affect the merits of the case as against the United States. *Benedicta est expositio quando res redimitur a destructione.*
>
> It must not be overlooked that this is not a proceeding to compel the commissioner to make an allowance to the judgment creditor, but is a suit upon such an allowance already made by that officer, after he has taken all the facts into consideration, and, so far as it appears or may be inferred, without objection on the part of the judgment debtor, and without any claim to the money having been set up by him for his own use.

There is no substantial difference between those cases and this. The only formal difference seems to be that in those

cases the person who made the appeal to the commissioner of internal revenue was the judgment creditor, while in this case it was made by the judgment debtor. In that respect this case is stronger than the other two. Here, the officer, after judgment had gone against him for some act done or suffered to be done in his name, but for which not he but the government should be held responsible, applied to the commissioner of internal revenue for relief, asking the payment of the judgment by the government. The commissioner, after investigation, reported the facts and circumstances connected with the claim to the secretary of the treasury, stating that he proposed to allow the claim for $10,130.31, to be paid to the judgment creditor upon due entry and satisfaction of said judgment. And this was afterwards duly approved by the secretary of the treasury (printed record, pp. 14 to 17, inclusive, Exh. B, C, and D).

So in the case at bar, the judgment debtor's prayer, or claim, was for the payment of the judgment, and the commissioner, having satisfied himself of the justice of that claim, accordingly ordered payment of the judgment to the judgment creditor, the only person to whom payment could be made.

Second. The fact that in the subsequent formal certificate of the commissioner (printed record, p. 14, Ex. E.) being a schedule form, Charles R. Coster, the judgment debtor, is described as claimant does not at all militate against the fact that the commissioner's order and intention was, as sanctioned by the secretary of the treasury, that payment of this money should be directly made to the judgment creditor. The proposed allowance by the commissioner, the approval of the secretary of the treasury, and the certification of the allowance of the claim of the judgment, all go together and must be construed together.

Dunnegan v. *United States*, 17 Ct. Cl., 247, 259, 260.
Dupasseur v. *United States*, 19 *Id.*, 461.

Indeed, the description of Charles R. Coster as claimant in the schedule was quite correct and consistent with the allowance of payment of the judgment to the judgment creditor. Charles R. Coster was the person who had appealed to the commissioner for payment of the judgment, and was therefore designated as claimant in the commissioner's books, and the commissioner allowed this claimant's appeal, and ordered the judgment to be paid to the judgment creditor in accordance with the claimant's prayer, and the well established practice of the department. *It was so understood by the fifth auditor, who ordered payment of the claim to the judgment creditor* (printed record, pages 17 and 18, Ex. F).

Third. Under section 3220, the commissioner is authorized in such cases not to *allow and certify* payment of a claim, but in the language of the statute, "to *repay* * * * all damages and costs recovered, &c." It is owing to other laws and regulations of the United States that the commissioner, not being a disbursing officer, cannot literally comply with the requirements of this statute, but must confine himself to an order or direction, an allowance and certification of a claim, in order that another officer may make the payment accordingly, instead of paying it himself. This makes the disbursing officers who pay the money upon his order or certification merely his agents or subordinates in carrying out the intention of the statute. His order, allowance, and certification would be equivalent to his drawing a check upon the treasury for the payment of the money in favor of the person to whom payment is to be made, if the practice of the department sanctioned such a course. Therefore, the commissioner having upon Coster's appeal, with the consent of the secretary of the treasury, ordered that the judgment of Frerichs against Coster should be paid to Frerichs, the judgment creditor, it was equivalent, if such

were the practice of the department, to giving a check for the amount payable to Frederick Frerichs. Such order or allowance for the payment of the money to him entitled, of course, Frerichs to receive the money, and in case of refusal, as in this instance, to sue for its recovery.

In the language of section 1059 of the revised statutes, defining the jurisdiction of the court of claims, Frederick Frerichs, the claimant here, under the order, allowance, and certification of the commissioner of internal revenue, approved by the secretary of the treasury, and the certification thereupon of the fifth auditor of the treasury department, certainly had a claim "founded upon a law of congress," to wit, section 3220, and also upon "regulations of the executive department," under which payment should have been, but could not be, made to him, because the first comptroller of the treasury department wrongfully refused to certify further to such payment. The decision and order of the commissioner for payment of the amount of the judgment to the judgment creditor, when that payment was afterwards prevented by the wrongful act of the first comptroller of the treasury, certainly entitled the judgment creditor to come into the court of claims as a petitioner to enforce such payment.

Fourth. By section 1059 of the revised statutes the court of claims also has jurisdiction of a claim founded "upon any contract expressed or implied with the government of the United States." *The decision of the commissioner of internal revenue upon Coster's appeal, approved by the secretary of the treasury, was equivalent to an account stated between the United States and Coster deciding that the amount of the judgment was due to the judgment creditor from and should be paid by the United States and promising to pay it to the judgment creditor.*

United States v. *Savings Bank*, 104 U. S., 728.

This decision of the commissioner raised an implied, if it was not an expressed, promise to Frerichs to pay the amount of the judgment to him; and there is ample consideration moving from Frerichs to the United States to support such implied promise and to authorize him to maintain an action thereon. He suffered the damages for which the judgment was given by reason of the wrongful acts of the defendant's agent, committed "in the due performance of his official duty." (Rev. Stat., sec. 3220). *It was therefore the duty of the United States, as principal, to pay the judgment, and their promise to pay it creates a contract which, whether expressed or implied, gives him a right of action.*

The principle is now well established, in this country at least, that "where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it, although the plaintiff was not privy to the consideration of such promise."

Lawrence v. *Fox*, 20 N. Y., 268, 271, *et seq.*
Burr v. *Beers*, 24 N. Y., 178.
Secor v. *Lord*, 3 Keyes, 525.
Coster v. *The Mayor of Albany*, 43 N. Y., 399, 410 to 412.

These decisions have not been shaken by *Simpson* v. *Brown* (68 N. Y., 356), cited by the appellant's counsel in the court below. That case was held not to come within the doctrine, because there was no promise to anyone to pay the plaintiff, his name being only mentioned incidentally in the condition of the bond.

So in Massachusetts:

Arnold v. *Lyman*, 17 Mass., 400.
Hall v. *Marston*, *Id.*, 575.
Brewer v. *Dyer*, 7 Cush., 337.

The case of *Mellen* v. *Whipple* (1 Gray, 317), cited by the appellant's counsel in the court below, does not overrule the former cases for the reasons stated by the court in *Lawrence* v. *Fox* (20 N. Y., p. 273).

But even if it should be considered an open question in this court, whether at common law an action could be brought by a person, not privy to the consideration, upon a promise made for his benefit by the defendant to a third person, *no doubt has ever been expressed in a case where there was privity of consideration between the plaintiff, in whose favor the promise was made, and the defendant.*

See the cases above cited and the dissenting opinion of Comstock, justice, in *Lawrence* v. *Fox*.

In the case at bar there was decidedly a privity of consideration between the United States and Frerichs. Coster, the officer and agent of the United States, had done, or caused to be done, an injury to Frerichs, by the wrongful seizure of his property, resulting in damages for which the latter recovered the judgment of $10,130.31 against him. The United States, upon investigation of the matter through its other officers and agents, the commissioner of internal revenue and the secretary of the treasury, thereto expressly authorized, found that that injury had been caused by Coster "in the due performance of his official duty," and thereupon, at Coster's request, and to save him harmless, ordered and promised to pay the amount of the judgment to Frerichs. Here is a case of such direct privity and relationship in consideration of the promise, that it comes up to every requirement of an expressed or implied contract.

Fifth. In the case of *Dunnegan* v. *United States* (17 Ct. Cl., 247), decided in 1881, and again in *Nixon* v. *United States* (18 Ct. Cl., 448), decided in 1883, the court of claims found and took judicial notice of the fact that it had been the "uniform practice of the commissioner and secretary,

from the first enactment of the refunding statute, to make allowance in such cases to the judgment creditor, and not to require the collector first to pay the same out of his own money, and then himself to apply for payment to the public treasury." No appeal was taken in these cases, but the United States have acquiesced therein.

It is respectfully submitted that, if there is any doubt as to the correctness of the practice of the department in this respect, under section 3220, such doubt should be solved in favor of upholding so reasonable and just a practice, and that, under the rules of this court, frequently laid down, the contemporaneous construction of those who are called upon to act under the law, and were appointed to carry its provisions into effect, is entitled, not only to very great respect, but should be allowed to turn the scale in doubtful cases.

Edwards, lessee, v. *Derby*, 12 Wheat., 210.
United States v. *Alexander*, 12 Wall., 177.
United States v. *Moore*, 95 U. S., 763.
United States v. *Pugh*, 99 *Id.*, 265.
Hahn v. *United States*, 107 *Id.*, 402.
Brown v. *United States*, 113 *Id.*, 568.

Point II.

IT IS NOT NECESSARY THAT THE PETITION SHOULD CONTAIN AN AVERMENT OF THE SATISFACTION OF THE JUDGMENT RECOVERED AGAINST THE COLLECTOR, OR THAT THE CLAIMANT HAD BEEN OR WAS READY TO ENTER SUCH SATISFACTION UPON PAYMENT OF THE JUDGMENT.

First. It will be convenient to consider the second proposition first. Section 3220 authorizes the commissioner to repay all the damages and costs recovered, and we have seen

that this would authorize him to pay the money directly to the judgment creditor. That, in making such payment, the commissioner should, if he were the disbursing officer, require a satisfaction of the judgment, would be but natural and proper, but it would not be a material part of his duty in making such payment. Not being a disbursing officer, he certifies to the allowance and he adds to it the direction that payment shall be made upon due entry of the satisfaction of such judgment. This is a very proper direction in order to procure evidence of the assent of the judgment creditor and a voucher for the payment; but it cannot be considered a condition precedent to the claimant's right to recover the amount where payment so ordered has been refused on account of the wrongful action of other officers of the department.

The averment of readiness to enter satisfaction of the judgment upon its being paid would be an idle superfluity. As the sole cause of action for the claimant is the decision of the commissioner, he, of course, necessarily takes it *cum onere*. The institution of a suit in the court of claims based on that decision is in law a declaration of the claimant's readiness upon receipt of the money to enter satisfaction of the circuit court judgment, stronger and more unequivocal than any verbal declaration could be. It is not a declaration made in mere words which might be evaded or repudiated, but is a declaration made in acts from which the law permits no escape.

Second. The appellant's position that the petition is defective because it contains no averment of the due entry by the claimant of satisfaction of the judgment recovered against the collector in the circuit court, is even more untenable. If the claimant had in fact entered satisfaction of the judgment before the commencement of his action in the court of claims, he would in the event of a failure find himself in

a bad predicament. The legal effect of the commissioner's decision was to require a satisfaction of the judgment, not prior to, but simultaneously with, the payment of the amount of the judgment to the claimant. The essence of the decision was that when that payment was made the judgment should be satisfied, and it contemplated a payment through the department, and not through the action of the court of claims. If the mere fact of payment by the treasury department to the claimant operated in law to satisfy the judgment, then, even in case of such payment by the treasury department without suit, a formal entry of satisfaction by the claimant might have been omitted without affecting the legal relations of the parties. If, however, a formal entry of satisfaction would in such a case have been essential to the discharge of the judgment, such entry would, of course, have been necessary. But whatever might or might not have been the effect of payment of this demand by the treasury department without suit as to the satisfaction of the circuit court judgment, it is certain that the payment of the demand in satisfaction of the judgment of the court of claims *ipso facto* satisfies the circuit court judgment. The money which the law empowers the claimant to recover from the United States in the court of claims on the commissioner's decision is the money due from the collector to the claimant on the judgment of the circuit court. The money which the United States owes to the claimant, on the commissioner's decision, is the identical money which the collector owes to the claimant. It follows that, while the object of the commissioner, in requiring satisfaction of the judgment, was, and in law must have been, the protection of the United States from further liability for a debt which the United States had assumed, and the protection of the collector was a mere incident to this arrangement, nevertheless, if the payment of

the money to the claimant, on a judgment of the court of claims, will satisfy the claimant's demand against the United States, so also will it satisfy the claimant's demand against the collector. That it would satisfy the claimant's demand against the United States would be unquestionable, even in the absence of a statute to that effect. But it is provided in the revised statutes as follows:

SEC. 1092. The payment of the amount due by any judgment of the court of claims, and of any interest thereon allowed by law, as hereinbefore provided, shall be a full discharge to the United States of all claim and demand touching any of the matters involved in the controversy.

Third. Even assuming that the payment of this demand pursuant to a judgment of the court of claims would not *ipso facto* satisfy the circuit court judgment as against both the collector and the United States, or that out of abundant caution it might for any reason be prudent to require an entry of satisfaction of the circuit court judgment before the rendition or before the payment of the judgment of the court of claims, it was suggested to the court below upon the argument of this cause that, by the well-established practice of that court in analogous cases, such a satisfaction of the circuit court judgment might be provided for, the court below might at the conclusion of the opinion delivered announce that judgment would be entered in accordance with the opinion upon the filing in that court of due proof by the claimant of entry of satisfaction of the judgment of the circuit court.

Little, administrator, v. *United States,* 19 Ct. Cl., p. 331.
Sharp v. *United States,* and nineteen other cases, 12 Ct. Cl., p. 642, paragraph xiii.
Burke v. *United States,* 13 Ct. Cl., p. 240.

The court below, as appears from its opinion, did not regard the defendant's objection well taken, but rendered judgment in favor of the claimant, without requiring satis-

faction of the judgment of the circuit court. Should this court consider the requirement of satisfaction necessary, it might modify the judgment of the court of claims accordingly. At all events, under the practice of the court of claims, and upon the facts stated in the claimant's petition, the objection could not be taken by demurrer, as the petition does state facts sufficient to constitute a cause of action.

Point III.

The objections of the attorney-general to the recovery by the claimant are purely and highly technical. Since 1876 the claimant has had the heavy hand of the government raised against him, and it was in the wrong throughout. Without cause or reason it took his property forcibly from him, all that he possessed; it pursued him with all its power and vigor, and when its district court pronounced the seizure unjust, and without excuse or reasonable cause, it appealed to its circuit court and to this court from that judgment. Meanwhile the suit for the recovery of damages which he brought was put off until the final determination of the seizure suit by the judgment of this court in October, 1882. Then the claimant's suit against the collector, in whose name the great wrong had been done to him, was finally brought to trial in 1884, and resulted in the recovery of the judgment against the collector. In this suit also the collector had the aid and assistance of the government, he was defended by the U. S. attorney and by private counsel. Then the collector, finding himself saddled with the judgment, although he had been merely an instrument committing the wrong in the due performance of his official duty, appealed to the commissioner of internal revenue for payment of that judgment, and that officer, upon investigating the facts, with the assent and approval of the secretary